PP

v.

GAN BOON AUN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
SU GEOK YIAM J
[CRIMINAL REFERENCE NO: 43-17-2011]
20 JULY 2012

CONSTITUTIONAL LAW: *Fundamental liberties - Breach of - Whether provision unconstitutional - Alternative charge - Securities Industry Act 1983, ss. 122(1), 122B(a)(bb) - False statement to Stock Exchange - Acquittal of principal charge of abetting - Whether acquittal barred accused from being charged and tried under alternative charge - Double jeopardy rule - Whether s. 122(1) void for breaching arts. 5(1), 7(2) and 8(1) Federal Constitution - Whether s. 122(1) denied accused right to be presumed innocent until proven guilty - Whether s. 122(1) usurped judicial power of court by deeming person guilty of offence*

Both accused persons in the instant case were charged in the Sessions Court with a principal charge under s. 86 and an alternative charge, under s. 122B(a)(bb) read with s. 122(1) of the now repealed Securities Industry Act 1983 ('the Act'). Under the principal charge the accused persons were alleged to have abetted a company ('TGB') in making a material misleading statement ('the statement') in its financial report which was likely to induce others to buy the company's securities. The alternative charge alleged that TGB by furnishing the statement with intent to deceive had committed an offence under s. 122B(a)(bb) of the Act and the accused by virtue of being directors of TGB at the material time, were deemed to have committed an offence under the same section read with s. 122(1) of the Act. At the close of the prosecution's case, the trial court acquitted and discharged the accused on the principal charge but ordered them to enter their defence for the alternative charge. The accused promptly objected that the alternative charge was invalid as s. 122(1) of the Act was unconstitutional and null and void. It was contended that the provision in s. 122(1) deemed the accused persons to have committed an offence was inconsistent with the fundamental right of an accused person to be presumed innocent until proven guilty, inconsistent with the basic rule that a criminal charge against an accused person had to be proved beyond reasonable doubt and offensive to the 'double jeopardy' rule as they had already been

A acquitted of an identical offence under the principal charge. Upon the application of the accused persons, the sessions court referred the matter to the High Court under s. 30 of the Courts of Judicature Act 1964 for determination of the question whether s. 122(1) violated arts. 5(1) and 8(1) of the Federal Constitution.

B

Held (acquitting and discharging the accused persons on the alternative charge):

(1) Section 122(1) of the Act was unconstitutional and void as it violated the right to a fair trial by abrogating the fundamental
C right of an accused person to be presumed innocent until proven guilty and to have a criminal charge against him proved beyond reasonable doubt by the prosecution. The arbitral and indiscriminating usage use of s. 122(1) in the instant case violated the fundamental rights of both accused guaranteed
D under arts. 5(1) and 8(1) of the Federal Constitution. (para 250)

(2) Section 122(1) of the Act also violated the doctrine of separation of powers enshrined in the Federal Constitution as
E well as art. 7(2) thereof. (para 250)

(3) Apart from bearing the burden of proving that TGB had committed a s. 122B(a)(bb) offence, there was no duty whatsoever cast on the prosecution to prove any fact
F stemming from the *actus reus* on the part of the accused before the presumption in s. 122(1) was triggered off. The provision presumed the accused guilty unless he proved himself innocent by establishing the defence prescribed under that section. This was completely inconsistent with the fundamental right of an
G accused to be presumed innocent until proven guilty. (paras 10 & 22)

(4) The ingredients in the principal and alternative charges were substantially the same and arose from the same set of facts. Under the principal charge the prosecution had to prove
H abetment by both accused but under the alternative charge, s. 122(1) was invoked to deem they had committed the abetment. The acquittal of the accused persons on the principal charge ought to have led to their acquittal on the
I alternative charge because the prosecution was precluded from

artificially deeming the existence of a matter it had set out to prove and failed. Since the accused persons had been acquitted of the principal charge, no trial could proceed on the alternative charge because that would have constituted the trial of a matter of which both accused persons had already been acquitted of. Such trial was double jeopardy and offended art. 7(2) of the Federal Constitution. (paras 210-221)

(5) Even if s. 122(1) was a valid law, its application by the prosecution on the accused was improper, indiscriminate and in violation of their fundamental rights and, ultimately, had to be struck down as unconstitutional state action. Following its failure to prove its case under the principal charge, the prosecution was precluded from proceeding on the alternative charge by relying on the deeming provision in s. 122(1). There were also other directors in the company but by charging only the two accused persons the Public Prosecutor had discriminated against them and they were not treated equally before the law as compared to the other directors. They also did not get the equal protection of the law as was expressly provided under art. 8(1) of the Federal Constitution. (paras 104 & 177-179)

(6) The Federal legislature in enacting s. 122(1) of the Act had usurped the judicial powers of the court by deeming that a director, chief executive officer or a representative of the body corporate had committed an offence where an offence had been committed by the body corporate. This offended the doctrine of separation of powers in the Federal Constitution and by virtue of art. 4(1) it was void. It was trite constitutional law that only the court could make a finding that a person had committed an offence. (paras 195-196)

Obiter:

(1) Despite the amendments to art. 121 of the Federal Constitution on 10 June 1988 *vide* Act A 704, the judicial power of the Federation remained with the courts for the reason (i) the Constitution did not vest judicial power in another organ of the Federation other than the courts nor did

A it provide for sharing of judicial power with the Executive or the Legislature and (ii) the marginal note to art. 121 was not amended leaving the title "the Judicial Power of the Federation" under Part IX entitled "the Judiciary". (paras 206-207)

B

Case(s) referred to:

Actors and Announcers Equity Association v. Fontana Films Pty Ltd [1982] 150 CLR 169 ***(refd)***

A-G v. Times Newspaper [1974] AC 273 ***(refd)***

Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 FC ***(refd)***

C *Badan Peguam Malaysia v. Kerajaan Malaysia [2008] 1 CLJ 521 FC* ***(refd)***

Balachandran v. PP [2005] 1 CLJ 85 ***(refd)***

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 FC ***(refd)***

D *Dato' Seri IR Hj Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abdul Kadir; Attorney General (Intervener) [2010] 2 CLJ 925 FC* ***(refd)***

Deputy Chief Police Officer of Perak & Anor v. Ramesh Thangaraju [2001] 1 CLJ 245 CA ***(refd)***

Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 SC ***(refd)***

E *Director of PP v. Kent and Sussex Contractors Limited [1944] 1 All ER 119* ***(refd)***

Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia [2007] 1 CLJ 19 CA ***(refd)***

Hinampad Enterprise Sdn Bhd v. Director Offorestry & The Government of

F *the State of Sabah [1996] 1 LNS 11 HC* ***(refd)***

Hinds v. The Queen [1977] AC 195 ***(refd)***

Hinds v. The Queen [1976] 1 All ER 353 ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan and Another Appeal [1997] 1 CLJ 665 ***(refd)***

Jamali Adnan v. PP [1985] 2 CLJ 415; [1985] CLJ (Rep) 167 SC ***(refd)***

G *Johnson Tan Han Seng v. PP & Other Appeals [1977] 1 LNS 38 FC* ***(refd)***

Justin Milroy Narakera v. PP [1990] 2 CLJ 226; [1990] 2 CLJ (Rep) 181 HC ***(refd)***

Khoo Cheng Huat v. PP [1990] 2 CLJ 790; [1990] 2 CLJ (Rep) 236 HC ***(refd)***

H *Lee Chin Hock v. PP [1972] 1 LNS 64 FC* ***(refd)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***

Leung Kwok Hung v. Hong Kong Special Administrative Region [2005] 887 KHCU 1 ***(refd)***

Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 FC ***(refd)***

Malaysian & Anor & nine other applications [1994] 4 CLJ 728 HC ***(refd)***

I *Mamat Daud & Ors v. The Government of Malaysia [1988] 1 CLJ 11; [1988] 1 CLJ (Rep) 197 SC* ***(refd)***

Maneka Gandhi v. Union of India and Another [1978] SC 597 ***(refd)***

Minister of Home Affairs v. Fisher [1979] 3 All ER 21 ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Nadarajah Somasundram v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysian & Anor & Nine Other applications [1994] 4 CLJ 728 ***(refd)***
State of Madhya Pradesh v. Veereshwar Rao Agnihotry [1957] SCR 868 ***(refd)***
Ng Eng Kooi & Anor v. PP [1970] 1 LNS 86 FC ***(refd)***
Ng Kim Moi v. Pentadbir Tanah Daerah Seremban Negeri Sembilan Darul Khusus [2004] 3 CLJ 131 CA ***(refd)***
Ong Ah Chuan v. PP & Another Appeal [1980] 1 LNS 181 PC ***(refd)***
Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105 FC ***(refd)***
PP v. Abdul Rahim Kalandari Mustan [2008] 5 CLJ 108 FC ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Choo Chuan Wang [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329 HC ***(refd)***
PP v. Dato Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC ***(refd)***
PP v. Datuk Harun Haji Idris & Ors [1976] 1 LNS 180 HC ***(refd)***
PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(refd)***
PP v. Lee Siew Ngock [1966] 1 LNS 143 HC ***(refd)***
PP v. Lim Hock Boon [2009] 3 CLJ 430 FC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Pung Chen Choon [1994] 1 LNS 208 SC ***(refd)***
PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***
PP v. Zulkifli Arshad [2010] 6 CLJ 121 FC ***(refd)***
Repco Holdings Bhd v. PP [1997] 4 CLJ 740 HC ***(refd)***
R v. Oakes [1986] 26 DLR (4th) 200 ***(refd)***
Salabianku v. France [1988] 13 EHRR 379 ***(refd)***
Sambasivam v. The Public Prosecutor, Federation of Malaya [1950] 1 LNS 80 PC ***(refd)***
Saminathan v. PP [1936] 1 LNS 65 HC ***(refd)***
Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah & Anor [2011] 1 CLJ 568 FC ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***
State of Madhya Pradesh v. Veereshwar Rao Agnihotry [1957] SCR 868 ***(refd)***
Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal [1998] 3 CLJ 85 CA ***(refd)***
Syed Ismail v. PP [1967] 1 LNS 175 HC ***(refd)***
Teh Cheng Poh v. PP [1978] 1 LNS 202 PC ***(refd)***
Tesco Supermarkets Ltd v. Nattrass [1972] AC 153 ***(refd)***
The State v. Abraham Liebrecht Coetzee, Hendrik Schalk Coetzee, Pieter Le Roux De Bruin, and Johan Marais [1997] ZACC 2 ***(refd)***
Woolmington v. DPP [1935] AC 462 ***(refd)***
Yau Heng Fang v. PP [1985] 2 CLJ 22; [1985] CLJ (Rep) 350 SC ***(refd)***
Yii Hung Siong v. PP [2005] 4 CLJ 158 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 30
Criminal Procedure Code, ss. 166, 180(1), (4), 418A
Dangerous Drugs Act 1952, ss. 2, 37(d), (da)
Federal Constitution, arts. 4(1), 5(1), 7(2), 8(1) 121, 145(3), 160,
Penal Code, s. 298A
Securities Commission Act 1993, s. 39(2)
Securities Industry Act 1983, ss. 2, 86, 88B, 122(1), 122B(a), 122B(a) (bb), 122C, 122C(2), 126(2)

Securities and Futures Act 2002 [Sing], s. 331(1)
South African Constitution, s. 25(3)(c)
South African Criminal Procedure Act 1977, s. 332(5)
Trade Practices Act 1974 [Aust], s. 45D(5)

Other source(s) referred to:
Faruqi, Shad Saleem, Star Publications (Malaysia), *[2008] Document of destiny: the constitution of the Federation of Malaysia*, pp 282-283

For the prosecution - Shanti Geoffrey (Nor Rifhan with her); DPP
For the 1st accused - Tan Hock Chuan (Cheah Sin Chin & Cains Tan with him); M/s Tan Hock Chuan & Co
For the 2nd accused - NS Guok; M/s Guok Leong Hong & Fong

Reported by Ashok Kumar

JUDGMENT

Su Geok Yiam J:

Background

[1] This is a reference by a subordinate court to the High Court pursuant to s. 30 of the Courts of Judicature Act 1964 (the "CJA") for the determination of the following constitutional question: whether s. 122(1) of the Securities Industry Act 1983 (Act 280) violates arts. 5(1) and 8(1) of the Federal Constitution?

[2] Section 30 of the CJA reads as follows:

> Reference of constitutional question by subordinate court
>
> 30. (1) Where in any proceedings in any subordinate court any question arises as to the effect of any provision of the constitution the presiding officer of the court may stay the proceedings and may transmit the record thereof to the High Court.

(2) Any record of proceedings transmitted to the High Court under this section shall be examined by a judge of the court and where the judge considers that the decision of a question as to the effect of a provision of the constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with s. 84 as if it were a case before him in the original jurisdiction of the High Court in which the question had arisen.

(3) Subsections (1) and (2) shall be deemed to be rules of court for the purposes of art. 128(2) of the constitution.

[3] Both accused were charged in the Kuala Lumpur Criminal Sessions Court (1) in two separate cases with having committed either one of two offences under the Securities Industry Act 1983 (Act 280) (the "Act"). The charges for the two offences were framed in the alternative.

[4] The principal charge was framed under s. 86 of the Act. The alternative charge was framed under s. 122B(a)(bb) read together with s. 122(1) of the Act.

The Charges

[5] The principal and the alternative charges are reproduced as follows:

Principal Charge

That you between 28 February 2006 to 15 February 2007, at Bursa Malaysia Securities Berhad, Exchange Square, Bukit Kewangan, 50200 Kuala Lumpur, in the Federal Territory of Kuala Lumpur, abetted Transmile Group Berhad (Company No. 373741-W) in making a statement that is misleading in a material particular in Transmile Group Berhad's "Quaterly Report On Unaudited Consolidated Results For The Financial Year Ended 31 December 2006" and the misleading statement is underlined in red in the appendix to this charge, and the said statement is likely to induce the purchase of securities of Transmile Group Berhad by other persons, and when the statement is misleading in a material particular, and you have thereby committed an offence under s. 86(b) read together with s. 122C(c) of the Securities Industry Act 1983 (Act 280) and punishable under s. 88B of the same Act.

Alternative Charge

That Transmile Group Berhad (Company No. 373741-W) between 14 February 2007 and 15 February 2007 at Bursa Malaysia Securities Berhad, Exchange Square, Bukit Kewangan

A 50200 Kuala Lumpur, in the Federal Territory of Kuala Lumpur, has committed an offence under s. 122B(a)(bb) of the Securities Industry Act 1983 (Act 280) when it, with intent to deceive, furnished a misleading statement to Bursa Malaysia Securities Berhad in Transmile Group Berhad's "Quaterly Report On Unaudited Consolidated Results For The Financial Year Ended
B 31 December 2006" and the misleading statement is underlined in red in the appendix to this charge and that you, who at the time of the commission of the offence was a director of Transmile Group Berhad, are deemed to have committed an offence under s. 122B(a)(bb) read together with s. 122(1) of the Securities
C Industry Act 1983, and punishable under s. 122B of the same Act.

[6] The Act has since been repealed by Parliament in 2007.

[7] The two cases were jointly tried.

D

[8] At the close of the prosecution case the learned Sessions Court judge (the "trial judge") acquitted and discharged both accused on the principal charge but she ordered both accused to enter their defence to the alternative charge.

E

Objection of the Defence on a Constitutional Issue

[9] Prior to the start of the defence, an objection was raised by both accused before the trial judge that the alternative charge is bad because s. 122 of the Act which contains the deeming
F provision is unconstitutional and, therefore, invalid, null and void.

[10] Both accused had contended as follows:

(1) Section 122(1) of the Act is completely inconsistent with the
G fundamental right of an accused person to be presumed innocent until proven guilty because it presumes the accused guilty unless he proves himself innocent by establishing the prescribed defence (as explained below).

(2) The invocation of s. 122(1) of the Act is completely
H inconsistent with the fundamental rule of criminal justice that a criminal charge must be proved beyond reasonable doubt against an accused person because it results in the statutory presumption of guilt without necessity of proof of any criminal element whatsoever against an accused person.

I

(3) The invocation of s. 122(1) of the Act in the present context also offends the cardinal rule that statutory presumptions in criminal law cannot be invoked indiscriminately and ought not to be applied in this case once the prosecution elects to proceed with the principal charge and both accused are acquitted on the principal charge.

[11] Upon the application of both accused the trial judge has referred the constitutional question to this court.

Submissions Of Both Accused

[12] Both accused submitted that s. 122(1) of the Act and, consequently, the alternative charge is illegal, unconstitutional and must be declared *void*. The reasons are as follows:

[13] Firstly, the provisions of the Federal Constitution must be given a broad and generous interpretation (see *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98).

[14] The principles of interpretation of ordinary statutes do not apply when interpreting the Federal Constitution (see *Dato' Seri IR Hj Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abdul Kadir; Attorney General (Intervener)* [2010] 2 CLJ 925 ("*Nizar's* case").

[15] The Federal Constitution must also be construed as a whole (see *Nizar's* case).

[16] Independent local interpretation of the Federal Constitution is to be preferred instead of relying on foreign decided cases (see the Federal Court case of *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507 ("*Sivarasa Rasiah's*" case).

[17] The court ought to adopt a prismatic approach and give full measure of fundamental rights when interpreting Part II of the Federal Constitution (see [2008] "Document of destiny: the constitution of the Federation of Malaysia", pp. 282-283 by Faruqi, Shad Saleem, Star Publications (Malaysia) and *Lee Kwan Woh v. PP* [2009] 5 CLJ 631, ("*Lee Kwan Woh's* case")).

[18] Provisos that limit or derogate those rights must be read restrictively (see *Badan Peguam Malaysia v. Kerajaan Malaysia* [2008] 1 CLJ 521 ("*Badan Peguam Malaysia*'s case").

[19] When construed in accordance with the principles as set out above issue one ought to be answered in the affirmative as the right of an accused to a fair trial involves the two basic principles of presumption of innocence on the part of an accused person and proof beyond reasonable doubt on the part of the prosecution.

[20] Secondly, the legislature ought not to substitute presumption of a matter as proof of a matter.

[21] In the case of s. 122(1) of the Act the federal legislature has over reached beyond what would be reasonably necessary to achieve its ends as there were no special or legitimate reasons warranting the displacement of any degree of procedural fairness which is a fundamental right guaranteed under art. 5(1) of the Federal Constitution let alone the complete abrogation thereof as contemplated by s. 122(1) of the Act.

[22] The reasons are as follows:

(a) There can be no justification for placing a more onerous defence on an accused charged under a deeming provision than he otherwise would have to bear without the deeming provision.

(b) Whilst it may in some situations be justifiable to presume a fact, there can be no justification to deeming the guilt of a person by legislation because an accused person is presumed innocent until and unless he is proven guilty by the prosecution.

(c) Section 122(1) is a provision of exceptionally wide application. It applies to any offence against the Act or its regulations whether minor or serious. When the company (big or small) commits an offence, such offence is deemed by law to be committed by each and every officer of the company. Section 2 of the Act defines "office" to include every "employee of the corporation". Such a wide definition is completely unjustified. It also represents a total and absolute abandonment of well established prosecutorial obligations to prove its charges against an accused person beyond reasonable doubt.

(d) The practical effect of s. 122(1) is the complete dispensation for the proof of any criminal element whatsoever against the accused, as the prosecution only needs to lead evidence to establish that the company has committed an offence and that the accused person was an officer of the company at the time.

(e) Therefore, there would as a consequence be no requirement for the prosecution to prove any criminal element against the accused on the standard beyond reasonable doubt. Hence, convictions using s. 122(1) are inherently unsafe.

(f) As s. 122(1) requires an accused person to bear the burden of disproving on a balance of probabilities an essential element of an offence (ie, the element of knowledge), it would be possible for a conviction to occur despite the existence of a reasonable doubt.

[23] Further or in the alternative, the manner in which the prosecution had initiated and proceeded with the alternative charge in the present case is in violation of the law and the fundamental right of the accused to be treated equally by the Public Prosecutor as enshrined in art. 8 of the Federal Constitution.

[24] Any exercise of administrative or judicial powers *ultra vires* the Federal Constitution may and ought to be struck down.

[25] The continued prosecution of the accused persons on the alternative charge is in violation of art. 7(2) of the Federal Constitution because both accused have already been acquitted of a similar offence brought under the principal charge (ie, s. 86 of the Act).

[26] Both accused submitted that in the final analysis, the alternative charge cannot stand and the accused must be acquitted and discharged.

Submissions of the Public Prosecutor

[27] The Public Prosecutor submitted that s. 122(1) of the Act is constitutional. The reasons are as follows:

[28] Firstly, there is a strong presumption of constitutional validity of s. 122(1) of the Act. The burden of proof is on both accused to prove otherwise (see *PP v. Datuk Harun Haji Idris & Ors* [1976] 1 LNS 180, *PP v. Pung Chen Choon* [1994] 1 LNS 208, *Yii Hung Siong v. PP* [2005] 4 CLJ 158, and *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105.)

[29] Secondly, it is not inconsistent with arts. 5(1) and 8 of the Federal Constitution.

A **[30]** The South African case is distinguishable on facts because there is an express provision in the South African Constitution which expressly provides that an accused is presumed innocent unless proven guilty. It was this express provision which led to the South African Court declaring s. 332(5) of the South African
B Criminal Procedure Act 1977 which contains a similar worded clause to be unconstitutional and void.

[31] Article 5(1) of the Federal Constitution does not state in express terms that an accused person is presumed innocent unless
C proven guilty and that in every case an accused person has a right to have a charge proved against him beyond reasonable doubt. Since there is no express presumption of innocence in art. 5(1) it is merely a doctrine and not a fundamental right. That being the case a provision of the Federal Constitution cannot be
D struck out on the ground that it contravenes a doctrine (see *PP v. Kok Wah Kuan* [2007] 6 CLJ 341).

[32] In *Ong Ah Chuan v. PP & Another Appeal* [1980] 1 LNS 181 the Privy Council did not accept the view that presumption of innocence is a part of the Singapore Constitution.
E

[33] In *R v. Oakes* [1986] 26 DLR (4th) 200 the court pointed out that *Ong Ah Chuan's* case dealt with a situation where the Singapore Constitution did not contain an explicit endorsement of the presumption of innocence.

F

[34] In *Badan Peguam Malaysia's* case the Federal Court refused to read into the Federal Constitution, words which did not exist therein.

G **[35]** Thirdly, there is no express prohibition in the Federal Constitution against the use of statutory presumptions by the prosecution to prove a charge against an accused person. The decision of the High Court in *PP v. Chia Leong Foo* [2000] 4 CLJ 649 ("*Chia Leong Foo's* case") needs to be to considered with
H caution. The reason is because in *PP v. Lim Hock Boon* [2009] 3 CLJ 430 the Federal Court had commented that *Chia Leong Foo's* case did not establish any principle that the prosecution cannot proceed to rely on a presumption if there exists evidence of the fact to be presumed.

I

[36] The approach adopted by the Malaysian courts with respect to statutory presumptions is as follows: A

[37] In *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713, the court held that the distinction between the word 'deem' and the word 'presume' is a fine one if at all there is such a distinction. B

[38] In *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 the court held that the general burden of proof is on the prosecution throughout the trial to prove the offence beyond reasonable doubt and where the prosecution relies on presumptions, the evidential burden of proof shifts to the defence to rebut such presumptions on the balance of probabilities. C

[39] In *Saminathan v. PP* [1936] 1 LNS 65 the court held that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him as provided in section 106 of the Evidence Act 1950 (see also *PP v. Zulkifli Arshad* [2010] 6 CLJ 121). D

[40] In *Ng Eng Kooi & Anor v. PP* [1970] 1 LNS 86 the court held that where an enactment provides a particular fact shall be presumed or deemed to exist unless the contrary is proved the accused has to satisfy the court on the balance of probabilities. E

[41] In *Ong Ah Chuan v. PP & Another Appeal* [1980] 1 LNS 181 the court held that it is fanciful to suggest that provisions of this nature offend natural justice. F

[42] The approach of the UK Courts with respect to statutory presumptions is as follows: G

[43] In the UK the English Court in *Woolmington v. DPP* [1935] AC 462 has held as follows:

> Throughout the web of the English Criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception" (see also *Sweet v. Parsley* [1970] AC 132 and *R v. Lambert* [2002] 2 AC 545). H

[44] In *Salabianku v. France* [1988] 13 EHRR 373 a deeming provision on possession of goods was held to be not in conflict with the European Convention on the Protection of Human Rights which expressly provides for presumption of innocence. I

[45] In *Peter Micheal Lingens & Gerd Leitgeb v. Austria Application* No: 8803/79 the court rejected the argument that the burden of proving that a statement is true which was contained in a statute was in conflict with the presumption of innocence in the European Convention for the Protection of Human Rights.

[46] Fourthly, it is the prerogative of the Public Prosecutor as expressly provided in art. 145(3) of the Federal Constitution to decide as to which director or officer of a body corporate to charge (see *Johnson Tan Han Seng v. PP & Other Appeals* [1977] 1 LNS 38 and *Teh Cheng Poh v. PP* [1978] 1 LNS 202).

[47] Fifthly, there is no violation of the double jeopardy rule as contained in art. 7(2) of the Federal Constitution because the ingredients of the two offences in the two charges are different (see *Jamali Adnan v. PP* [1985] 2 CLJ 415; [1985] CLJ (Rep) 167). In that case, it was held that offences must have the same essential ingredients before the double jeopardy rule is applicable.

[48] In the instant case both the accused were not recharged under the alternative charge subsequent to their acquittal by the trial judge (see *Nadarajah Somasundram v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysian & Anor & Nine Other applications* [1994] 4 CLJ 728).

[49] The acquittal of both accused under the principal charge has not been confirmed on appeal by a superior court.

[50] Section 166 of the Criminal Procedure Code expressly allows the Public Prosecutor to frame charges in the alternative (see *State of Madhya Pradesh v. Veereshwar Rao Agnihotry* [1957] SCR 868). In that case it was decided that the *autrefois acquit* principle was not applicable when it involves alternative charges in the same trial.

[51] Sixthly, in a number of cases cited by both accused where challenge was mounted against particular provisions of the law on the ground of conflict with particular articles of the constitution, this argument was not accepted by the court (see *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19, *Badan Peguam Malaysia's* case and *Sivarasa Rasiah's* case.

[52] Seventhly, the Federal Constitution must be interpreted within its four walls (see the book 'An Introduction to The Malaysian Legal System by Wan Arfah & Ramy Bulan' and also *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan and Another Appeal* [1997] 1 CLJ 665).

[53] Eightly, s. 122 of the Act contains a reasonable classification. Hence it does not offend art. 8 of the Federal Constitution (see *Badan Peguam Malaysia's* case). A

[54] Ninthly, the court has to consider the purpose and background of s. 122 of the Act. In *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153 the court held that the rationale for attributing knowledge of company to individuals in a company is because a company can only act through its officers. B

[55] In *Director of PP v. Kent and Sussex Contractors Limited* [1944] 1 All ER 119 the court held that a company can only know or form an intention through its human agents. C

[56] In *Justin Milroy Narakera v. PP* [1990] 2 CLJ 226; [1990] 2 CLJ (Rep) 181 the court explained how the deeming provision in the Employment Provident Fund ("EPF") Act 1951 operates. D

[57] In *Lee Chin Hock v. PP* [1972] 1 LNS 64; [1972] 2 MLJ 30 the court said as follows:

> to say that the prosecution has of necessity to lead evidence to meet any defence that may be open to the accused is to place upon it an impossible burden" (see also the Hansards dated 10 December 1982 and 21 Oct 1986 and the book "Capital market Development in Malaysia: History & Perspectives). E

[58] Finally, it is only in exceptional cases that the courts have declared a provision in the law to be unconstitutional (see *Repco Holdings Bhd v. PP* [1997] 4 CLJ 740, *PP v. Dato' Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 and *Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 and *Mamat Daud & Ors v. The Government of Malaysia* [1988] 1 CLJ 11; [1988] 1 CLJ (Rep) 197). F G

Decision of the Court

[59] This court heard the able arguments and submissions of all the parties, in particular, Mr Tan Hock Chuan, the learned counsel for the 1st accused and Madam Shanti Geoffrey, the learned Senior Deputy Public Prosecutor (the "SDPP") for the Public Prosecutor, including the very impressive plethora of cases cited by both of them and the South African case of *The State v. Abraham Liebrecht Coetzee, Hendrik Schalk Coetzee, Pieter Le Roux De* H I

Bruin, and Johan Marais [1997] ZACC 2 *("The State v. Abraham Liebrecht Coetzee & 3 Ors")* which was cited and heavily relied upon by Mr NS Guok, the learned counsel for the 2nd accused.

[60] This court agreed with and accepted the arguments and submissions of both the learned defence counsels much to the disappointment of Madam Shanti Geoffrey, the learned SFC. This court was of the view that s. 122(1) of the Act is unconstitutional and, therefore, void (the "said decision").

Reasons for the Said Decision

[61] The reasons why this court made the said decision are as follows:

Issues for the Determination of this Court

[62] This court was of the view that in order to determine the constitutional question referred by the Kuala Lumpur Sessions Court to this court, this court has to determine the following four issues:

Issue 1: Whether the right of an accused person to be presumed innocent until proven guilty and whether the right of an accused person to have a charge proved against him beyond reasonable doubt are fundamental rights as enshrined in art. 5(1) of the Federal Constitution?

Issue 2: If the answer to Issue 1 is in the affirmative, whether s. 122(1) of the Act abrogates these two fundamental rights as enshrined in art. 5(1) of the Federal Constitution?

Issue 3: If the answer to Issue 2 is in the negative, whether there was an indiscriminate use of the presumption in s. 122(1) of the Act on the part of the prosecution against both accused which violates art. 8(1) of the Federal Constitution and renders their prosecution under the alternative charge unconstitutional and, therefore, invalid? and

Issue 4: Whether s. 122(1) of the Act violates the doctrine of separation of powers and is inconsistent with the Federal Constitution?

[63] In view of the submissions put forth by both parties, this court was of the view that there is another issue which has arisen for the determination of this court.

[64] The issue is as follows:

> Issue 5: Whether the decision of the Public Prosecutor to proceed with the alternative charge against both accused after the trial judge had recorded an order of acquittal in their favour under the principle charge violates the rule against double jeopardy as enshrined in art. 7(2) of the Federal Constitution so as to render their prosecution under the alternative charge unconstitutional and, therefore, invalid?

Sections 86, 88B, 122B(a)(bb) And 122(1) Of The Act

[65] The court shall deal first with ss. 86, 88B, 122B(a)(bb) and 122(1) of the Act since all these provisions are mentioned in the two charges as reproduced earlier.

[66] Section 86 of the Act makes it an offence for anyone who, without caring whether the statement or information is true or false, or who, knows or ought reasonably to have known that the statement or information is false or misleading in a material particular, makes or disseminates a false or misleading statement in a material particular which is likely to induce the sale or purchase of securities by other persons or is likely to have the effect of raising, lowering, maintaining or stabilizing the market price of securities.

[67] The section reads as follows:

> **False or misleading statement, etc**
>
> **86.** Subject to s. 87B, a person shall not make a statement, or disseminate information, that is false or misleading in a material particular and is likely to induce the sale or purchase of securities by other persons or is likely to have the effect of raising, lowering, maintaining or stabilizing the market price of securities if, when he makes the statement or disseminates the information:
>
> (a) he does not care whether the statement or information is true or false: or
>
> (b) she knows or ought reasonably to have known that the statement or information is false or misleading in a material particular.
>
> (emphasis added)

[68] Section 88B sets out the punishment for the offence.

[69] The section reads as follows:

Penalty for offence under Division 1

88B. A person who contravenes or fails to comply with ss. 84, 85, 86, 87, 87A, or 88 commits an offence and is liable on conviction to a fine of not less than one million ringgit and to imprisonment for a term not exceeding ten years.

(emphasis added)

[70] Section 122B(a)(bb) of the Act makes it an offence, *inter alia*, for any person who makes or furnishes any false or misleading statement or report to the commission, a stock exchange or a recognized clearing house relating to the affairs of a listed corporation with intent to deceive the commission, a stock exchange or a recognized clearing house, as the case may be.

[71] Section 122B of the Act reads as follows:

False reports to commission, stock exchange or recognized clearing house

122B. A person who:

(a) with intent to deceive, makes or furnishes; or

(b) knowingly authorizes or permits the making or furnishing or, any false or misleading statement or report to the commission, a stock exchange or recognized clearing house relating to:

(aa) dealing in securities;

(bb) the affairs of a listed corporation;

(cc) any matter or thing required by the commission for the due administration of this Act; or

(dd) the enforcement of the rules of a stock exchange or the rules of a recognized clearing house.

commits an offence and is liable on conviction to a fine not exceeding three million ringgit or to imprisonment for a term not exceeding ten years or to both.

(emphasis added)

[72] Section 122C of the Act makes it an offence for any person who *inter alia*, attempts, abets or is engaged in a criminal conspiracy to commit any offence under the Act, whether or not the offence is committed in consequence of the abetment or conspiracy to commit the offence. The section reads as follows:

> Attempts, abetments and conspiracies
>
> 122C. A person who:
>
> (a) attempts to commit any offence under this Act;
>
> (b) does any act in furtherance of the commission of any offence under this Act; or
>
> (c) abets or is engaged in a criminal conspiracy to commit (as those terms are defined in the Penal Code) any offence under this Act, whether or not the offence is committed in consequence thereof,
>
> commits such offences and is liable to the penalty for such offence.

The Common Elements In The 2 Charges

[73] This court noted that the following common elements are present in both charges:

(1) Transmile Group Berhad ("TGB") committed an offence by furnishing a misleading statement which contained a material particular to the Bursa Malaysia Securities Berhad (the "BMSB");

(2) The misleading statement is contained in TGB's "quartery report on unaudited consolidated results for the financial year ended 31 December 2006" ("Quarterly Report"); and

(3) TGB knew (ie, with intent to deceive) or ought reasonably to have known at the material time that the statement is misleading in a material particular.

Section 180(4) Of The Criminal Procedure Code

[74] This would mean that in the event the prosecution is able to prove the aforesaid elements beyond reasonable doubt, then it would follow that TGB would have committed an offence under s. 86 of the Act and also under s. 122B(a)(bb) of the Act.

[75] In the principal charge, both accused are charged with abetting TGB in the commission of the s. 86 offence. Under this charge, it is clear that the prosecution bears the burden of proving all the elements of the offence of abetment under s. 122C(c) of the Act against the accused beyond reasonable doubt based on credible evidence as provided in s. 180(4) of the Criminal Procedure Code (the "CPC").

[76] Section 180 of the CPC reads as follows:

> Procedure after conclusion of case for prosecution
>
> 180. (1) When the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused
>
> (2) If the court finds that the prosecution has not made out a *prima facie* case against the accused, the court shall record an order of acquittal.
>
> (3) If the court finds that a *prima facie* case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence.
>
> (4) For the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

The Prescribed Defence Contained in s. 122(1) Of The Act

[77] Under the alternative charge, both accused are deemed to have committed the s. 122B(a)(bb) offence which was committed by TGB. The relevant deeming provision relied upon by the prosecution is s. 122(1) of the Act. By virtue of the presumption in that section, under the alternative charge, the prosecution only bears the burden of proving that TGB committed the s. 122B(a)(bb) offence.

[78] Both accused have to prove that the offence was committed without their consent or connivance and that they had exercised all such diligence to prevent the commission of the offence as they ought to have exercised, having regard to the nature of their functions in that capacity and to all the circumstances (the "prescribed defence").

[79] Section 122(1) of the Act reads as follows:

> Where an offence against this Act or any regulation made thereunder has been committed by a body corporate, any person who at the time of the commission of the offence was a director, a chief executive officer, an officer or a representative of the body corporate or was purporting to act in such capacity, is deemed to have committed that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.
>
> (emphasis added)

Definition Of "Officer"

[80] Section 2 of the Act defines "officer" to mean as follows:

> officer, in relation to a corporation includes:
>
> (a) Any director, secretary or employee of the corporation;
>
> (b) A receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument; and
>
> (c) Any liquidator of a company appointed in a voluntary winding up,
>
> but he does not include:
>
> (d) Any receiver who is not also a manager;
>
> (e) Any receiver and manager appointed by the court; or
>
> (f) Any liquidator appointed by the court or by the creditors.

Effect Of The Acquittal Of Both Accused At The Close Of The Prosecution Case

[81] In the course of the trial of both accused under the principal and alternative charges, it was not disputed by both accused that TGB had committed the s. 86 offence by furnishing a misleading statement to Bursa Malaysia Securities Berhad ("BMSB").

[82] At the close of the prosecution case, the trial judge would have to undertake a positive and maximum evaluation of the evidence adduced before her in order to determine whether the prosecution had established a *prima facie* case which is a case

A which is sufficiently strong for the accused to answer. She must then direct herself as follows as laid down in the leading case of *Balachandran v. PP* [2005] 1 CLJ 85:

[83] If I were to call for the defence and both accused were to
B elect to remain silent, am I prepared to convict them on the evidence now before me?

[84] Having directed herself in that manner the trial judge found that the prosecution had failed to establish a *prima facie* case against both accused for the principal charge. She recorded an
C order of acquittal against both accused under the principal charge.

[85] Hence, by acquitting both accused of the principal charge, it can safely be concluded that the trial judge was not prepared to convict both accused on the strength of the prosecution
D evidence.

[86] Hence, it can be deduced from the acquittal of both accused under the principal charge that the trial judge found that although TGB had committed the s. 86 offence in furnishing the
E misleading statement to the BMSB, there was insufficient evidence to prove on a *prima facie* basis that both accused had abetted TGB in the commission of the s. 86 offence.

[87] Nevertheless, the trial judge ordered both accused to enter their defence on the alternative charge.
F

[88] If there was no *prima facie* case of abetment factually made out against both accused, it must follow that the trial judge called for the defence of both accused under the alternative charge based purely on the basis that both accused were statutorily
G deemed to have committed the offence under s. 122B(a)(bb) of the Act by virtue of s. 122(1) of the Act. Hence, by operation of that provision, both accused bear the burden of proving the prescribed matters under the section ie, that the s. 122B(a)(bb) offence was committed without their consent or connivance and
H that they had exercised all such diligence to prevent the commission of the s. 122B(a)(bb) offence as they ought to have exercised having regard to the nature of their functions in that capacity and to all the circumstances.

I **[89]** This would mean that both accused had to prove their innocence instead of merely waiting until the prosecution had established a *prima facie* case against them and only then does the

evidentiary burden (not the legal burden) shift to them to give an innocent explanation which is an explanation that is more likely to be true than not as is the case if the deeming provision is one which is identical to the one contained in s. 37(d) of the Dangerous Drugs Act 1952 (the "DDA").

[90] Section 37(d) of the DDA reads as follows:

> (d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

[91] Section 37(da) of the DDA reads as follows:

> (da) any person who is found in possession of:
>
> (i) 15 grammes or more in weight of heroin;
>
> …
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug; …

Article 5(1) Of The Federal Constitution

[92] Article 5(1) protects the life and liberty of a person because it expressly provides that no person shall be deprived of his life or liberty save in accordance with law.

[93] The article reads as follows:

> Part II
>
> FUNDAMENTAL LIBERTIES
>
> 5. (1) No person shall be deprived of his life or personal liberty save in accordance with law.
>
> (2) …
>
> (3) …
>
> (4) …
>
> (5) …

[94] What is the meaning of "law"?

[95] Article 160 defines "law" to include:

> "written law, the common law in so far as it is operation in the federation or any part thereof, and any custom or usage having the force of law in the federation or any part thereof."

[96] This court was of the view that s. 122(1) of the Act completely abrogates the presumption of innocence which is protected and enshrined in art. 5(1) of the Federal Constitution. The effect of the deeming provision in s 122(1) of the Act is that when a company commits a s. 122B(a)(bb) offence, a director or an officer of the company is automatically deemed to have committed the offence.

[97] Both accused have to prove their innocence. Since both accused are statutorily required to prove their innocence as opposed to merely being required to raise or cast a doubt on the prosecution case, it would mean that s. 122(1) of the Act has also completely abrogated the right of both accused to have the alternative charge proved against them beyond reasonable doubt.

[98] It is trite law that in criminal proceedings the legal burden of proving the guilt of both accused beyond reasonable doubt lies throughout on the prosecution and the law requires the prosecution to prove the charge against an accused person beyond reasonable doubt at the conclusion of the trial (See *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457).

Article 4(1) Of The Federal Constitution

[99] Article 4(1) of the Federal Constitution expressly declares that the Federal Constitution is the supreme law of the federation. It also expressly provides that any law passed which is inconsistent with the Federal Constitution shall, to the extent of the inconsistency, be void.

[100] The provision states as follows:

> Supreme law of the Federation
>
> 4(1) This constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this constitution shall, to the extent of the inconsistency, be void.

The South African Constitution

[101] Upon a close scrutiny and comparison of the relevant provision in the South African Constitution and art. 5(1) of the Federal Constitution it is clear that the words "shall be presumed innocent" are non-existent in art. 5(1) of the Federal Constitution as opposed to s. 25(3)(c) of the South African Constitution.

Article 8(1) Of The Federal Constitution

[102] Article 8(1) protects the persons in Malaysia from legal discrimination because it expressly provides that all persons are equal before the law and are entitled to the equal protection of the law.

[103] The article reads as follows:

> 8. (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.
>
> (3) …
>
> (4) …
>
> (5) …
>
> (emphasis added).

[104] This court was of the view that the deeming provision in s. 122(1) of the Act also strikes at the heart of art. 8(1) of the Federal Constitution. The reason is because there were other directors in the company but only the two accused persons were charged. Therefore, by the act of charging them the Public Prosecutor had discriminated against them and both accused were not treated equally before the law as compared to the other directors. They also did not get the equal protection of the law as expressly provided under that constitutional provision.

[105] The court agreed with the contentions of both accused that in the present case, there are no good reasons for the displacement of their rights to the equal protection of the law and to be presumed innocent until proven guilty.

[106] As stated earlier the SFC has submitted that s. 122(1) of the Act is essential because a corporation acts through its officers and hence there is legitimate reason to deem their guilt. She has also submitted that it will be difficult for the prosecution to prove the guilt of both accused without the aid of the deeming provision.

The Rules Of Interpretation Applicable To The Federal Constitution

[107] This court is bound by the doctrine of *stare decisis* to apply the following principles of law to the interpretation of the Federal Constitution as laid down in the cases cited herein which have been decided by the Court of Appeal, Supreme Court and Federal Court.

[108] Cases cited herein of courts in other jurisdictions concerning the same principles of law are also relevant.

[109] Firstly, the Federal Constitution must at all times be given a broad and generous interpretation.

[110] In *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98, Raja Azlan Shah Ag LP (as His Royal Highness then was) said as follows at p. 32:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way - 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v. Fisher*) [1979] 3 All ER 21. A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: "A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition and rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect of those fundamental rights and freedoms." The principle of interpreting constitutions "with less rigidity and

more generosity'" was again applied by the Privy Council in *Attorney-General of St Christopher, Navis and Anguilla v. Reynolds* [1979] 3 All ER 129, p. 136.

It is in the light of this kind of ambulatory approach that we must construe our Constitution.

[111] The Courts of Hong Kong have also adopted a similar approach when interpreting their basic law.

[112] In *Leung Kwok Hung v. Hong Kong Special Administrative Region* [2005] 887 KHCU 1, Li CJ when delivering the unanimous judgment of the Court of Final Appeal said as follows at p. 6:

… It is well established in our jurisprudence that the courts must give such a fundamental right a generous interpretation so as to give individuals its full measure. *Ng Ka Ling v. Director of Immigration* [1999] 2 HKCFAR 4 at 28-9. On the other hand, restrictions on such a fundamental right must be narrowly interpreted. *Gurung Kesh Bahadur v. Director of Immigration* [2002] 5 HKCFAR 480 at para. 24. Plainly, the burden is on the Government to justify any restriction. This approach to constitutional review involving fundamental rights, which has been adopted by the court, is consistent with that followed in many jurisdictions. Needless to say, in a society governed by the rule of law, the courts must be vigilant in the protection of fundamental rights and must rigorously examine any restriction that may be place on them. (emphasis added).

[113] Secondly, the principles of interpretation of ordinary statutes do not apply when interpreting the constitution.

[114] In *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 ("*Lee Kwan Woh's* case") the Federal Court held that the principles of interpretation of ordinary statutes do not apply when interpreting the constitution.

[115] In that case, Gopal Sri Ram FCJ said as follows at p. 638:

… Before we embark upon that interpretive exercise, it is important to bear in mind the principles that govern the interpretation of the Federal Constitution.

In the first place, the Federal Constitution is the supreme law of the Federation. Though by definition it is a written law (see, s. 66 of the Consolidated Interpretation Acts of 1948 & 1967) it is not an ordinary statute. Hence, it ought not to be interpreted by the use of the canons of construction that are employed as

guides for the interpretation of ordinary statutes. Indeed, it would be misleading to do so. As Lord Diplock said in *Hinds v. The Queen* [1976] 1 All ER 353, at p. 359:

> To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in their Lordships' view, be misleading …

[116] Likewise in *Dato' Seri IR Hj Mohammad Nizar Jamaluddin v Dato' Seri Dr Zambry Abdul Kadir*; Attorney General (Intervener) (FC) [2010] 2 CLJ 925 ("*Nizar's* case") Arifin Zakaria CJ adopted the following *dicta* from the Privy Council in *Hinds v. The Queen* [1976] 1 All ER 353.

[117] His Lordship said as follows at p. 940[24]:

> To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would … be misleading.

[118] Thirdly, the Federal Constitution cannot be read literally. Instead it must be given a generous and liberal interpretation.

[119] It is not to be construed in any narrow or pedantic sense (see *PP v. Datuk Harun Haji Idris & Ors* [1976] 1 LNS 180).

[120] In *Lee Kwan Woh's* case, Gopal Sri Ram FCJ held as follows at p. 639:

> In the second place, the constitution is a document *sui generis* governed by interpretive principles of its own. In the forefront of these is the principle that its provisions should be interpreted generously and liberally. On no account should a literal construction be placed on its language, particularly upon those provisions that guarantee to individuals the protection of fundamental rights ...

[121] A similar view was expressed in the judgment of Hashim Yusoff FCJ in *Badan Peguam Malaysia v. Kerajaan Malaysia* [2008] 1 CLJ 521, where the Federal Court approved, *inter alia*, the following passage in the judgment of the Court of Appeal in *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19 at p. 28:

> The long and short of it is that our constitution - especially those articles in it that confer on our citizens the most cherished of human rights - must on no account be given a literal meaning. It should not be read as a last will and testament. If we do that then that is what it will become.

[122] Fourthly, the Federal Constitution must also be construed as a whole. (see *Nizar's* case). A

[123] More recently, the principles were restated by Arifin Zakaria CJ in *Nizar's* case where His Lordship went on to hold that the Federal Constitution must be interpreted in accordance with its own provisions. B

[124] At p. 940 His Lordship said as follows:

> In Minister of *Home Affairs v. Fisher* [1979] 3 All ER 21, the Privy Council was faced with interpreting the fundamental rights provisions of the Bermuda Constitution. It concluded by saying that these provisions "call for a generous interpretation avoiding the austerity of tabulated legalism, suitable to give to individuals the full measure of the fundamental rights and freedom." (See also *Teh Cheng Poh v. PP* [1979] 1 MLJ 50.) And this court in *Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 stated: C D
>
> > Secondly, as the Judicial Committee of the Privy Council held in Minister of *Home Affairs v. Fisher* at p. 329, a constitution should be construed with less rigidity and more generosity that other statutes and as *sui juris*, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which has been used. E
>
> In this context, it is also worth recalling what Barwick CJ said when speaking for the High Court of Australia, in *Attorney General of the Commonwealth, ex relatione McKinley v. Commonwealth of Australia* at p. 17: F
>
> > The only true guide and the only course which can produce stability in constitutional law is to read the language of the constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning. G

[125] Fifthly, in construing the Federal Constitution in accordance with its own language and intent, the use of foreign precedents are of limited utility. H

[126] In *Nizar's* case Arifin Zakaria CJ held as follows at p. 950:

> … In this regard it is important to bear in mind what was said by Raja Azlan Shah J (as His Royal Highness then was in *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187 at p. 188: I

A

> Whatever may be said of other constitutions, they are ultimately of little assistance to us because our constitutions now stands in its own right and it is in the end the wording of our constitution itself that is to be interpreted and applied and this wording 'can never be overridden by the extraneous principles of other constitutions' - see *Adegbenro v. Akintola & Anor*. Each country frames its constitution according to its genius and for the good of its own society. We look at other constitutions to learn from their experiences and from a desire to see how their progress and well-being is ensured by their fundamental law.

Abdul Hamid Mohamad PCA (as he then was) in *PP v. Kok Wah Kuan* [2007] 6 CLJ 341 similarly said, "So, in determining the constitutionality or otherwise of a statute under our constitution by the court of Law, it is the provision of our constitution that matters, not a political theory by some thinkers."

And as stated in the authorities referred to earlier, the interpretation of a constitution calls for more generosity than other statutes and as *sui juris*, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which had been employed ...

[127] The push for an independent local interpretation to the Federal Constitution was also evident in the Federal Court case of *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507.

[128] In that case Gopal Sri Ram FCJ when referring to *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187 (FC) said as follows at p. 516:

> It was submitted during argument that reliance on the *Vacher* case was misplaced because the remarks were there made in the context of a country whose Parliament is supreme. The argument has merit. As Suffian LP said in *Ah Thian v. Government of Malaysia* [1976] 2 MLJ 122:
>
> > The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the constitution, and they cannot make any law they please.
>
> This earlier view was obviously overlooked by the former Federal Court when it followed *Vacher's* case. Indeed it is, for reasons that will become apparent from the discussions later in this judgment, that the courts are very much concerned with issues of

whether a law is fair and just when it is tested against art. 8(1). Further, it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the constitution itself, any statute (including one amending the constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis. Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution. See, *Keshavananda Bharati v. State of Kerala* AIR [1973] SC 1461).

[129] There is, therefore, a need to be careful in construing foreign cases and, in particular, UK cases and cases from other jurisdictions where there is no written constitution when it comes to interpreting the words of the Federal Constitution.

[130] Sixthly, this court ought to adopt a prismatic approach and give the full measure of the fundamental rights when interpreting Part II of the Federal Constitution.

The express words of Part II (arts. 5 to 13) is not an exhaustive catalogue of the rights of the citizen. An express constitutional right may be rendered meaningless unless supported by various un-enumerated rights. These rights may be referred to as un-enumerated and non-textual rights which are constitutionally protected" (per Faruqi, Shad Saleem, document of destiny: the Constitution of the Federation of Malaysia, 2008 Star Publications (Malaysia), pp. 270-272 and 382-385.

[131] In relation to interpretation of the fundamental rights guaranteed under Part II of the Federal Constitution, Gopal Sri Ram FCJ in the Federal Court in *Lee Kwan Woh's* case made the further following observations on the 'prismatic' approach at p. 639:

... In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the constitution. When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II. Indeed the prismatic interpretation of the constitution gives life to abstract concepts such as "life" and "personal liberty" in art. 5(1) ...

[132] His Lordship cited the decision of Beg J. in *Maneka Gandhi v. Union of India and Another* [1978] SC 597. In that case the learned judge held that to be a fundamental right it is not necessary that a right must be specifically mentioned in a particular article. It is fundamental if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that fundamental right or facilitates the exercise of the named fundamental right.

[133] That regard must be had to art. 8(1) of the Federal Constitution which is omnipresent. His Lordship held as follows at p. 641:

> A court when interpreting the other provisions of our constitution, in particular, those appearing in Part II thereof, must do so in the light of what has been correctly referred to as "the humanising and all pervading provisions of art. 8(1)". (see, *Barat Estates Sdn Bhd & Anor v. Parawakan a/l Subramaniam & Ors* [2000] 3 CLJ 625.) That article reads: "All persons are equal before the law and entitled to the equal protection of the law." In the Badan Peguam Malaysia this court in the majority judgment of Hashim Yusoff FCJ also accepted and applied the following statement of the Court of Appeal in *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia*:
>
> > When interpreting the other parts of the constitutions, the court must bear in mind the all pervading provision of art. 8(1). That article guarantees fairness of all forms of state action. See, *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771.
>
> The effect of art. 8(1) is to ensure that legislative, administrative and judicial action is objectively fair. It also houses within it the doctrine of proportionality which is the test to be used when determining whether any form of state action (executive, legislative or judicial) is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed. See *Om Kumar v. Union of India AIR* [2000] SC 3689.
>
> The fourth principle of constitutional interpretation is this. Whilst fundamental rights guaranteed by Part II must be read generously and in a prismatic fashion, provisos that limit or derogate those rights must be read restrictively. As Lord Nicholls of Birkenhead and Lord Hope of Craig Head in the Privy Council case of *Prince Pinder v. The Queen* [2002] UKPC 46 said in their joint dissent:
>
> > It should never be forgotten that courts are the guardians of constitutional rights. A vitally important function of court is to interpret constitutional provisions conferring rights with

> the fullness needed to ensure that citizens have the benefit of these constitutional guarantees are intended to afford. Provisos derogating from the scope of guaranteed rights are to be read restrictively. In the ordinary course they are to be given 'strict and narrow', rather than broad, constructions'" see *The State v. Petrus* [1985] LRC (Const) 699, 720d-f, per Aguda JA in the Court of Appeal of Botswana, applied by their Lordship's Board in *R v. Hughess* [2002] 2 AC 259, 277 part 35.
>
> This passage was quoted with approval by the majority of this court in the *Badan Peguam Malaysia's* case.

[134] In *Nizar's* case, Arifin Zakaria CJ agreed with the Privy Council in *Minister of Home Affairs v. Fisher* [1979] 3 All ER 21, where the board said the Constitution was to be read to give 'generous interpretation avoiding the austerity of tabulated legalism, suitable to give to individuals the full measure of the fundamental rights and freedom'.

[135] In other words, all fundamental liberties contained in Chapter II of the Federal Constitution must be construed to give the full measure of the fundamental rights and freedom (see also *Deputy Chief Police Officer of Perak & Anor v. Ramesh Thangaraju* [2001] 1 CLJ 245 (CA)).

> Issue 1: Whether the right of an accused person to be presumed innocent until proven guilty and whether the right of an accused person to have a charge proved against him beyond reasonable doubt are fundamental rights as enshrined in art. 5 (1) of the Federal Constitution?
>
> Issue 2: If the answer to Issue 1 is in the affirmative, whether s. 122(1) of the Act abrogates these two fundamental rights as enshrined in art. 5(1) of the Federal Constitution?

[136] This court was of the view that the first and second issues ought to be answered in the affirmative. The reasons are as follows:

(1) Article 5(1) of the Federal Constitution provides that "no person shall be deprived of his life or personal liberty save in accordance with the law".

(2) "The phrase" in accordance with law" has been construed to mean in accordance with a system of law that does not flout the fundamental rules which include the rules governing the

A burden of proof in a criminal case and the rules of natural justice which afford protection for the individual in the enjoyment of his fundamental liberties (see *Ong Ah Chuan v. PP & Another Appeal* [1980] 1 LNS 181; [1981] 1 MLJ 64 at p. 71 and *Ng Kim Moi v. Pentadbir Tanah Daerah Seremban* B *Negeri Sembilan Darul Khusus* [2004] 3 CLJ 131; [2004] 3 MLJ 301, at p. 321).

(3) One of the most basic and important fundamental rule is an accused person is presumed innocent until proven guilty and C the burden of proof of the guilt of the accused beyond reasonable doubt is on the prosecution throughout the trial and it never shifts to the accused person because there is no burden on the accused person to prove his innocence beyond reasonable doubt (see *Arulpragasan Sandaraju v. PP* [1996] 4 D CLJ 597 and *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311). Where there is a rebuttable statutory presumption however only the evidentiary burden shifts to the accused person and the accused person has to rebut it on the balance of probabilities (see *PP v. Yuvaraj* and E *Mohamad Radhi v. PP*).

(4) In the instant case the presumption in s. 122(1) of the SIA is entirely different from the one in the cases cited above where the prosecution must prove certain basic facts before the rebuttable statutory presumption is triggered off such as F custody and control before the rebuttable presumption of knowledge is triggered off under the DDA or possession before the rebuttable statutory presumption of "trafficking" under the DDA 1952 is triggered off.

G **[137]** Here, the provision concerned presumes the accused person guilty unless he proves himself innocent by establishing the prescribed defence. There is no duty whatsoever cast on the prosecution to prove any fact stemming from the *actus reus* on the part of the accused person before the presumption is triggered off.

H

[138] This is completely inconsistent with the fundamental right of an accused person to be presumed innocent until proven guilty as provided in art. 5(1) of the Federal Constitution.

I **Right Of An Accused Person To A Fair Trial**

[139] An un-enumerated and non-textual right in the context of a criminal proceeding is the right of an accused person to a fair trial under the Federal Constitution.

[140] The Federal Court in *Lee Kwan Woh*'s case held that any person charged with a criminal offence in Malaysia is constitutionally guaranteed to a fair trial. It held that this is a fundamental right guaranteed under arts. 5(1) and 8(1) of the Federal Constitution:

> Whether an impugned state action is substantively or procedurally fair must depend on the fact pattern of each case. However, when the principle is applied to a criminal case, what it means is that an accused has a constitutionally guaranteed right to receive a fair trial by an impartial tribunal and to have a just decision on the facts. If there is an infraction of any of these rights, the accused is entitled to an acquittal.
>
> … Drawing the threads together, it is clear from the authorities that it is a fundamental right guaranteed by art. 5(1) that a person's life (in its widest sense) or his or her personal liberty (in its widest sense) may not be deprived save in accordance with State action that is fair both in point of procedure and substance. Whether an impugned State action is substantively or procedurally fair must depend on the fact pattern of each case. However, when the principle is applied to a criminal case, what it means is that an accused has a constitutionally guaranteed right to receive a fair trial by an impartial tribunal and to have a just decision on the facts. If there is an infraction of any of these rights, the accused is entitled to an acquittal.

[141] The question which arises in what are the un-enumerated and non-textual rights which constitute a "fair trial" in criminal cases?

[142] Based on the decided cases, this court is of the view that the right to a fair trial encompasses both substantive and procedural fairness.

[143] In *Lee Kwan Woh's* case, it was accepted that the rules of natural justice are part of the cluster of rights guaranteed under art. 5(1). Accordingly the two fundamental natural justice principles widely held to be legally necessary to a fair trial or valid decision in a legal system ie,. *Nemo judex in causa sua*: "nobody shall be a judge in his own cause", invalidating any judgment where there is a bias or conflict of interest or duty: and *audi alteram partem*: "hear the other side", giving at least a fair opportunity to present one's case: are amongst other aspects of natural justice, constitutionally guaranteed rights.

[144] Also within the cluster of rights encompassing a 'fair trial' is also the right to a hearing within a reasonable time. The Federal Court confirmed this in *Lee Kwan Woh's* case when it approved the judgment of Edgar Joseph Jr J (as he then was) *PP v. Choo Chuan Wang* [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329 where he held that art. 5(1) implied a right not only to a fair hearing before an impartial court but also to a hearing within a reasonable time, at p. 333:

> … Article 5(1) of our constitution does imply in favour of an accused person the right to a fair hearing within a reasonable time by an impartial court established by law. It follows that if an accused person can establish a breach of this right then, in the words of Sandhawalia, CJ in *Madheshwardhari Singh v. The State (ibid)*, he would be entitled to an unconditional release and the charges levelled against him would fall to the ground.

[145] Non-compliance with the provisions of the CPC may also constitute the denial of a fair trial. On the facts of *Lee Kwan Woh's* case itself the Federal Court set aside a conviction on the grounds that the accused was denied the right to make a submission of no case at the close of the prosecution case, which is a departure from s. 180(1) of the CPC:

> We must consider the impact of what we have said thus far on the fact of the instant case. In our judgment, the constitutionally guaranteed right in an accused to a fair trial includes his right to make a submission of no case at the close of the prosecution's case. It is a right that he or she may waive. But he or she cannot be deprived of it. That unfortunately is what happened here. The accused accordingly did not have a fair trial and art. 5(1) was violated. Following *PP v. Choo Chuan Wang* he is entitled to have his conviction set aside on this ground.

[146] In the context of a criminal case, there is also the right of an accused person to be presumed innocent until proven guilty, which in Malaysia is well established since the decision of the Supreme Court in *Yau Heng Fang v. PP* [1985] 2 CLJ 22; [1985] CLJ (Rep) 350. In that case the Supreme Court held as follows at p. 356:

> … In all criminal trials the accused is deemed to be innocent until proven guilty by the prosecution. There is no burden placed on the accused to prove his innocence. Since *Woolmington v. DPP* [1935] AC 462 was decided in 1935, the only defence in England that placed a legal burden of proof on the balance of probabilities on the accused is the defence of insanity. Other defences such as alibi placed merely an evidential burden of introducing some

evidence enough to create reasonable doubt in the minds of the jury (see *R v. Johnson* [1961] 46 Cr App R 55 and *R v. Stebbing* [1962] Cr LR 472) …

[147] There is a strong rationale why the law prescribes the higher standard of proof in offences of a criminal nature, as opposed to the civil standard in civil wrongs. Whereas persons wrongly accused of civil wrongs can be compensated by damages and other suitable remedies, the damage and stigma that befalls a person who is found guilty of a criminal offence is irreversible and it is likely to remain with him for the rest of his life. Before a person can be pronounced guilty of a charge, therefore, the court or tribunal must be very sure of his guilt.

[148] The right to have criminal charges proven beyond reasonable doubt against the accused is, therefore, a fundamental right.

[149] Drawing the threads together as submitted by both accused, this court concluded that amongst the cluster of un-enumerated and non-textual fundamental rights of an accused person ingrained in our criminal law as well as the common law, *inter alia*, are (a) the right to be presumed innocent until proved guilty; (b) the right to a trial within a reasonable time; (c) the right to have criminal charges against him proved to the standard of beyond reasonable doubt; (d) the right to the applicability of the twin rules of natural justice by the court which is trying him.

[150] These rights are fundamental rights to procedural fairness. These are rights of the accused and these rights are well established in the common law and in our law and are within the cluster of rights envisaged under art. 5(1) of the Federal Constitution.

[151] These rights are also universally acknowledged human rights and their place in our criminal justice system and of comparable democracies is and ought to be unquestionable.

[152] In the event there is an infraction of the accused's right to a fair trial, the accused ought to be and shall be acquitted (see *Lee Kwan Woh's* case).

[153] Furthermore, as stated earlier, it is provided in art. 4(1) of the Federal Constitution that any law passed (or exercise of legislative power) which is inconsistent with the Federal Constitution shall, to the extent of the inconsistency, be void.

[154] This court was, therefore, of the view that the presumption of innocence on the part of an accused person and the right of an accused person to have a criminal charge proven beyond reasonable doubt are essential hallmarks of the Malaysian criminal justice system. They are also constitutional guarantees which are well entrenched in the Federal Constitution.

[155] That being the case, since s. 122(1) of the Act deems both the accused guilty without the necessity by the prosecution to prove any *actus reas* on their part the section has abrogated the presumption of innocence and the duty of the prosecution to have the charge proved against them beyond reasonable doubt which are the fundamental rights of both accused. Therefore, this court rules that the section is clearly inconsistent with art. 5(1) of the Federal Constitution. To the extent of that inconsistency this court ought to rule it as unconstitutional and void pursuant to the express provisions of art. 4(1) of the Federal Constitution.

[156] The South African Constitutional Court in *The State v. Coetzee & 3 Others* had declared s. 332(5) of the South African Criminal Procedure Act 1977 a provision, which is similar to s. 122(1) of the Act, unconstitutional and *void*.

[157] Section 332(5) of the South African Criminal Procedure Act 1977 states as follows:

> When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was at the time of the commission of the offence, director or servant of the corporate body shall be deemed guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it ...

[158] Langa J (p. 24) said as follows:

> In the final analysis, whether (the section) creates a form of statutory liability, with a shift in onus in respect of a part thereof or a new crime with a special defence, the result is the same. The objection which is fundamental to the reversal of onus in this case is that the provision offends against the principle of a fair trial which requires that the prosecution establish its case without assistance from the accused. In either event, the right of the accused to be presumed innocent is breached.

[159] This court was of the view that even though the Federal Constitution is not in *pari materia* with the South African Constitution which has an express provision containing the presumption of innocence on the part of an accused person this court ought to declare the deeming provision in s. 122(1) of the Act unconstitutional and *void* for the reasons given herein.

[160] The statutory provision under challenge in the Australian case of *Actors and Announcers Equity Association v. Fontana Films Pty Ltd* [1982] 150 CLR 169 ("*Actors* case") was a reverse presumption of s. 122(1) of the Act.

[161] Sub-section 45D(5) of the Australian Trade Practices Act 1974 provided that, where two or more officers of a union engaged in concerted conduct, the union itself was deemed to engage in that conduct, unless it could show 'that it took all reasonable steps' to prevent the officers doing so.

[162] By a five to two majority, the Australian High Court held the provision to be unconstitutional and invalid. Although the invalidity was for most part premised on whether legislature had the necessary 'power' under the Australian Constitution, a number of significant observations were made by the High Court of Australia over 'deeming provisions' of this nature.

[163] Firstly, it was observed that the sub-section does more than merely change the onus of proof. It provides that the burden of proof may be discharged only in a particular way.

[164] Mason J observed as follows:

> The sub-section is not an onus of proof provision. To escape the deeming operation it will avail the trade union nothing to prove that it did not act in concert with the officers or that it did not act in concert for the relevant purpose. To escape it must go further and show that it took all reasonable steps to prevent the participants from engaging in that conduct.

[165] Secondly, it was held that such a deeming provision amounted to a legislative provision for the suppression of the truth.

[166] Murphy J observed as follows:

> Unlike a presumption, the purpose and effect of a deeming provision is to prevent any attempt, by either party, to prove the truth. Legislative provision for suppression of the truth in judicial proceedings is inconsistent with the exercise of judicial power and

A unconstitutional. I would adopt the words of Hayfron-Benjamin C.J. in the Supreme Court of Botswana who trenchantly criticized deeming provision in *Odendaal v. The State Unreported*: 11 March 1980. : "The position would be grotesque indeed were it possible for the prosecution to be relieved of the burden of proving the existence of any particular incriminating fact while the defence is at the same time conclusively debarred from establishing its non-existence.

[167] Similarly, s. 122(1) of the Act is clearly not a mere *onus* of proof provision, it goes beyond the facilitation of procedural C evidence or the shifting of evidential burden. To escape liability, it would not be enough for an accused person to establish that he did not know or connive to the offence committed by the company. He would have to show that he exercised "all such diligence to prevent the commission of the offence as he ought to D have exercised, having regard to the nature of his functions in that capacity and to all the circumstances".

[168] The provision does not purport to make a presumption of a fact. It is *per se* a legislative presumption that a person is guilty E of a criminal act without the necessity for the prosecution to prove his guilt. This is because the provision requires the accused to prove his innocence. This is an affront to the presumption of innocence.

F **[169]** In the context of the alternative charge, the requirement under s. 122(1) of the Act to prove due diligence puts an accused person in a worse off position than if he would have been charged under s. 122B(a)(bb) without invoking s. 122(1) of the Act. This is because it would have been sufficient for him in his defence to establish a single element ie, that he did not have knowledge.

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[170] This court agreed with the submission of the learned counsels for both accused that this does not make sense at all. A deeming provision is meant to be invoked when the prosecution does not have the evidence to establish the fact presumed. Yet, H when there ought to be evidence of criminality the burden placed on an accused person is lighter in contrast with a scenario where there is a basic lack of evidence and there is a need to rely on the presumption in s. 122(1).

I **[171]** Hence, s. 122(1) cannot be considered a legislative action which is consonant with the liberties enshrined in arts. 5(1) and 8(1) of the Federal Constitution.

[172] Such a provision clearly strikes at the heart of the notion of a fair trial. In the Canadian Supreme Court case of *R v. Oakes* [1986] 1 SCR 103, 26 DLR (4th) 200 Dickson CJC held as follows at p. 36:

> In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.

[173] As stated earlier, art. 4(1) of the Federal Constitution expressly provides that the Federal Constitution is the supreme law of the Federation and any law passed (or exercise of legislative power) which is consistent with the Federal Constitution shall, to the extent of the inconsistency, be void.

[174] In *Sivarasa Rasiah's* case, the Federal Court held as follows at p. 517:

> ... Further, it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the constitution itself, any statute (including one amending the constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis. Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution. See *Keshavananda Bharati v. State of Kerala* AIR [1973] SC 1461.

[175] Nevertheless, before an act of legislature is struck down, the court has to weigh whether any specific national security, public safety or public interest may be so important that it should be predisposed to displace procedural fairness in a particular case. However, the onus is upon the prosecutor to prove the reasons therefore. In the instant case there was no such reason advanced by the learned SDPP to the court.

[176] Accordingly, in the judgment of this court s. 122(1) of the Act must be declared unconstitutional and void.

A Issue 3: If the answer to Issue 2 is in the negative, whether there was an indiscriminate use of the presumption in s. 122(1) of the Act on the part of the prosecution against both accused which violates art. 8(1) of the Federal Constitution and renders their prosecution under the alternative charge unconstitutional and, therefore, invalid?
B

[177] This court was of the view that even if s. 122(1) is a valid law, its application by the prosecution is improper, indiscriminate and in violation of both accused's fundamental rights and,
C ultimately, must be struck down as unconstitutional state action.

[178] The reasons are as follows:

[179] Firstly, this court was of the view that there was an indiscriminate resort to the deeming provision in s. 122(1) of the
D Act by the public prosecutor to both the accused in the instant case.

[180] In *PP v. Chia Leong Foo* [2000] 4 CLJ 649, Augustine Paul J (subsequently Court of Appeal Judge and later Federal Court
E Judge) held that the indiscriminate application of deeming provisions may amount to a violation of art. 8(1) of the Federal Constitution.

[181] His Lordship observed that presumptions are only a special
F mode of proving facts which must otherwise be proved by evidence. It follows that where there is such other evidence presumptions cease to apply as such evidence, being not inadmissible, is capable of proving the very facts to be presumed.

G **[182]** His Lordship explained that such a restriction is necessary to prevent gross unfairness to an accused person. His Lordship also said as follows at p. 669:

> Fairness to the accused therefore demands that the presumption provisions are used only when there is no evidence of the facts
H to be presumed.

[183] The right to fair invocation of the deeming provisions is a constitutional right:

> Arbitrary use of the presumption provisions, without any fixed
I guidelines, when there is direct evidence of the facts to be presumed may also prejudice the accused in another way. When the presumption provisions are invoked in one case and not in

> another although there is direct evidence of the facts to be presumed in both instances there may be a violation of art. 8(1) of the Federal Constitution which guarantess equal protection of the law.

[184] By extension, the arbitrary use of the deeming provision of s. 122(1) is an affront to the right to a fair trial and hence, art. 5(1) of the Federal Constitution.

[185] Coming back to the factual matrix at hand the principal charge and the alternative charge are charges consisting of substantially the same elements and upon the same facts as set out earlier. The significant difference between the two charges is the prosecution's evidential approach. In the principal charge, the prosecution sets out to prove that the accused knowingly abetted TGB to commit an offence by furnishing a misleading statement to BMSB.

[186] Following the dicta of the late Augustine Paul J (as His Lordship then was) in *PP v. Chia Leong Foo* the apparent availability of such evidence in itself precludes the prosecution from relying on the deeming provision in s. 122(1) of the Act. It would otherwise be grossly unfair to the accused for the prosecution to then proceed to rely on the deeming provision in s. 122(1) of the Act in the alternative charge after a finding by the trial judge that the evidence led by the prosecution failed to establish a *prima facie* case on the principal charge.

[187] In fact, the dicta of the Federal Court in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 suggests that the prosecution has to elect whether to proceed under a deeming provision or not. The two routes were held to be different and mutually exclusive.

[188] The Federal Court said as follows in that case at p. 477:

> In our view, the problem is easily solved by the prosecution intimating to the defence and to the court at the first available opportunity if its case is one of actual trafficking or if it intends to rely on a presumption to establish trafficking and, if the latter be the case, to identify the precise presumption.

[189] In *PP v. Abdul Rahim Kalandari Mustan* [2008] 5 CLJ 108, a case involving the DDA the Federal Court also required the prosecution to elect whether to rely on direct or circumstantial evidence of "trafficking" in s. 2 of the DDA or on the statutory presumption of trafficking in s. 37(d) of the DDA at p. 128:

There is one further point that is of some importance. It is on the issue of fairness to the respondent. In *Lim Hock Boon (supra)* the Court of Appeal made the point clear when it said this at p. 53:

> The principle to be extracted from Chia Leong Foo is that once the prosecution elects to rely on one of the statutory presumptions in s. 37 of the Act, it cannot at a later stage of the trial seek to rely on the very general definition of s. 2 of the Act. That is exactly the position here. Throughout its case, the prosecution proceeded on the basis that it was relying on s. 73(da). That much is clear from the appeal record. To resort to the wide and untrammeled definition in s. 2 of the Act at the end of the case, being quite ineffective as a matter of law would be unfair and unjust to the accused.

[190] This court is of the view that what was said by the courts in those cases is equally applicable to the facts of the instant case.

[191] Applying the principles as laid down in those cases to the situation at hand, it must mean that the prosecution had elected to prove evidentially that the accused knowingly abetted TGB to commit an offence by furnishing a misleading statement to the BMSB but it failed. By virtue of that failure, it would be precluded from proceeding on the alternative charge by relying on the deeming provision in s. 122(1) of the Act.

[192] It follows from that election that the defence of both accused ought not to have been called on the alternative charge for it is invalid.

[193] To proceed with the alternative charge now would be grossly unfair to both accused. It would mean that the prosecutor is now entitled to deem as true the very matters that the prosecutor had failed to prove in the principal charge.

[194] Such wanton and unfair reliance on a deeming provision must be considered an infringement of the right of both accused to a fair trial as guaranteed under arts. 5(1) and 8(1) of the Federal Constitution and must be struck down and both accused acquitted (see *Chia Leong Foo's* case).

Issue 4: Whether s. 122(1) of the Act violates the doctrine of separation of powers and is inconsistent with the Federal Constitution?

[195] To recapitulate, s. 122(1) of the Act provides as follows: A

> Where an offence against this Act or any regulation made thereunder has been committed by a body corporate, any person who at the time of the commission of the offence was a director, a chief executive officer, an officer or a representative of the body corporate or was purporting to act in such capacity, is deemed to have committed that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances. B C
>
> (emphasis added)

[196] In my judgment, the Federal Legislature, in enacting s. 122(1) of the Act, has usurped the judicial powers of the court by deeming that a director, chief executive officer or a representative of the body corporate has committed on offence where an offence has been committed by the body corporate. This is because it is trite constitutional law that only the courts can make a finding that a person has committed on offence. D E

[197] What is the doctrine of separation of powers?

[198] In the case of *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal* [1998] 3 CLJ 85, the Court of Appeal said as follows at para. C p. 108: F

> The Federal Constitution has entrusted to an independent judiciary the task of interpreting the supreme law and, indeed, all laws enacted by the legislative arm of government. Hence, it is to the courts that a citizen must turn to enforce rights conferred by the Federal Constitution or other written law or existing at common law. This is a cardinal principle of constitutional law … G

[199] In *Hinds v. The Queen* [1977] 1 AC 195, Lord Diplock made two observations that are applicable to the case at hand. In the first place he said as follows of the Jamaican Constitution at p. 212D-213D: H

> … It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature. As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the constitution itself may even omit any I

express provision conferring judicial power upon the judicature. Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial power of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively. To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in their Lordship's view, be misleading – particularly those applicable to taxing statutes as to which it is a well established principle that express words are needed to impose a charge upon the subject. In the result there can be discerned in all those constitutions which have their origin in an Act of the Imperial Parliament at Westminster or in an Order in Council, a common pattern and style of draftsmanship which may conveniently be described as "the Westminster model."

Before turning to those express provisions of the Constitution of Jamaica upon which the appellants rely in these appeals, their Lordships will make some general observations about the interpretation of constitutions which follow the Westminster model. All Constitution on the Westminster model deal under separate Chapter headings with the legislature, the executive and the judicature. The Chapter dealing with the judicature invariably contains provisions dealing with the method of appointment and security of tenure of the members of the judiciary which are designed to assure to them a degree of independence from the other two branches of government. It may, as in the case of the Constitution of Ceylon, contain nothing more. To the extent to which the constitution itself is silent as to the distribution of the plenitude to judicial power between various courts it is implicit that it shall continue to be distributed between and exercised by the court that were already in existence when the new constitution came into force; but the legislature, in the exercise of its power to make laws for the "peace, order and good government" of the state, may provide for the establishment of new courts and for the transfer to them of the whole or part of the jurisdiction previously exercisable by an existing court. What, however, is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the constitution : *Liyanage v, The Queen* [1967] 1 A.C. 259, 287-288 (at para. D, p. 212 to para D, p. 213).

[200] In *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah (supra)*, the Court of Appeal observed as follows: A

> The Constitution of Sri Lanka (formerly Ceylon) does not even mention the expression judicial power. Yet, upon high authority it has been held that despite the omission, the provisions in that document: B
>
> … manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a constitution by which it was intended that judicial power should be shared by the executive or the legislature. The constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature (per Lord Pearce in *Liyanage v. The Queen* [1967] 1 AC 259 AT P 287). C D
>
> The Indian Constitution also does not make mention of judicial power being vested in the judiciary. Yet, the same position obtains there as in Sri Lanka. See *Minerva Mills Ltd v. Union of India*. Like the Constitutions of Sri Lanka and India, the Federal Constitution preserves the separation of powers between the three arms of Government and evinces no intention that the judicial power of the federation shall be passed to or shared with the executive or the legislature. It follows that the judicial power of the federation remains where it has always been, namely, with the judiciary. E F
>
> (emphasis added)

[201] Therefore, in my judgment, although there is no provision in the Federal Constitution laying down the doctrine of separation of powers, it is clear that the doctrine is part of the Federal Constitution because our constitution is based on the Westminster model. G

[202] In this regard, it is important to scrutinize closely art. 4(1) of the Constitution. The article has been reproduced in the earlier part of this judgment. H

[203] It is very pertinent that art. 4(1) states any law passed after Merdeka Day which is inconsistent with this constitution shall to the extent of the inconsistency be void. It does not state that any law which is inconsistent with any provision of this constitution shall to the extent of the inconsistency be void. I

[204] An overall study of the Federal Constitution makes it clear that it recognizes the doctrine of separation of powers as follows:

(a) Part IV Chapter 3 concerns the executive (arts. 39-43C);

(b) Part IV Chapters 4 and 5 concern the legislature (arts. 44-68);

(c) Part IX concerns the judiciary (arts. 121-131A).

[205] As such, the doctrine of separation of powers is a basic structure of the Federal Constitution, and any law which breaches this basic structure, is unconstitutional. In *Sivarasa Rasiah's case*, the Federal Court held as follows at p. 515:

> The third and final observation is in respect of the sustained submission made on the appellant's behalf that the fundamental rights guaranteed under Part II is part of the basic structure of the constitution and that Parliament cannot enact laws **(including Acts amending the constitution) that violate the basic structure**. (emphasis added).

[206] Therefore, despite the amendments to art. 121 on 10 June 1988 *vide* Act A 704, the judicial power of the Federation remained with the courts for two reasons:

[207] First, the Federal Constitution did not vest judicial power in another organ of the Federation other than the courts. It did not provide for sharing of judicial power with the executive or the legislature. Secondly, the marginal note to art. 121 was not amended leaving the title "the Judicial Power of the Federation" under Part IX entitled "the Judiciary". In other words, judicial power is still vested in the courts.

[208] In any event, common sense dictates that in a democracy, the doctrine of separation of powers is a basic structure of the constitution and must be adhered to. In the context of s. 122(1) of the Act, the judicial power must be vested in the judiciary ie, the courts of law, not in the executive or in the Federal legislature.

[209] Unlike other presumption provisions in laws such as the DDA as reproduced in the earlier part of this judgment s. 122(1) of the Act deems an officer of the company to have committed an offence not because he had committed some other impugned or overt act, but because the company had committed an offence.

By stipulating that he is deemed to have committed the offence, the Federal Legislature is making a finding that he is guilty of an offence. This offends the doctrine of separation of powers in the Federal Constitution and by virtue of art. 4(1) it is void.

[210] The Malaysian position can be compared and contrasted with the Singaporean position.

[211] The corresponding provisions in the corresponding Singaporean legislation are as follows:

> Section 111 Of The Securities Industry Act 1986
>
> "Offences by body corporate"
>
> Where a body corporate is guilty of an offence under this Act, any director, executive officer, secretary or employee of the body corporate who was, in any way, by act or omission, directly or indirectly, knowingly concerned in, or a party to, the commission of the offence shall also be guilty of that offence.

[212] The Securities Industry Act 1986 was repealed and replaced by the Securities and Futures Act (Chapter 289) 2002 (the "2002 Act"). Section 331(1) of the 2002 Act reads as follows:

> "Corporate offenders and unincorporated associations"
>
> Where an offence under this Act is committed by a body corporate and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of an officer of the body corporate, the officer as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

[213] Based on the above comparison it is clear that the Legislature in Singapore has seen it fit to repeal a provision similar to s. 122(1) of our Act.

[214] The new provision requires the prosecution to prove some act or omission on the part of the accused person before the presumption is triggered off.

Issue 5: Whether the decision of the Public Prosecutor to proceed with the alternative charge against both accused after the trial judge had recorded an order of acquittal in their favour under the principle charge violates the rule against double jeopardy as enshrined in art. 7(2) of the Federal Constitution so as to render their prosecution under the alternative charge unconstitutional and, therefore, invalid?

[215] This court was of the view that the constitutional right of both accused against being placed in double jeopardy has been violated in the instant case.

[216] Article 7(2) of the Federal Constitution expressly provides that a person who has been acquitted or convicted of an offence shall not be tried again for the same offence. The only exception to that prohibition is where a superior court has set aside the conviction or acquittal and has ordered a retrial of the person on a charge for the same offence.

[217] The article reads as follows:

> A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.

[218] In interpreting art. 7(2), the Supreme Court in the case of *Jamali Adnan v. PP* [1985] 2 CLJ 415; [1985] CLJ (Rep) 167, ruled that the phrase "the same offence" in art. 7(2) means "an offence whose ingredients are the same".

[219] In the instant case, the court considered the question whether the ingredients of the principal charge and the alternative charge are substantially the same. The key difference is this. Under the principal charge the prosecution has to prove abetment by both accused but under the alternative charge, s. 122(1) is invoked to deem that both accused had committed the abetment.

[220] As stated earlier the established principles of fair trial dictate that the acquittal of both accused on the principal charge ought to have led to the acquittal of both accused under the alternative charge because the prosecution is precluded from artificially deeming the existence of a matter which it had set out to prove and failed. They ought not to invoke the deeming in the same charge let alone use it in a different charge to prove a matter which they have sought to prove and failed.

[221] It follows, therefore, that since both accused have been acquitted of the principal charge, no trial may now proceed on the alternative charge because that would constitute the trial of a matter which both accused have already been acquitted of. Such trial is double jeopardy and offends art. 7(2). This is because the ingredients which are the intent and purport of the two charges are the same and they arise from the same set of facts.

[222] Apart from that it has been held that estoppel operates in criminal proceedings and the prosecutor may not subject a verdict to collateral challenge or reopen any issue already decided. One of the leading cases on point is a Privy Council decision originating from Malaya. It is *Sambasivam v. The Public Prosecutor, Federation of Malaya* [1950] 1 LNS 80 (PC).

[223] In that case, the accused was originally charged with two offences: (1) carrying a firearm and (2) being in possession of ammunition, both capital offences under the Emergency Regulations 1948. He had been badly wounded in an incident. The same day he was alleged to have made a statement which was a confession to both charges but he denied making the statement.

[224] At the trial the assessors acquitted him of both charges. The learned Judge accepted the verdict of acquittal of the ammunition charge. However, he did not agree with the verdict to the firearm charge and he ordered a retrial of that charge.

[225] At the retrial, the assessors were not told of the acquittal on the ammunition charge and they convicted the accused on the firearm charge. The Privy Council quashed the conviction.

[226] In the judgment of the Board delivered by Lord MacDermott, the following passage is relevant to the issue in the instant case:

> ... the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. ...
>
> The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim '*res judicata pro veritate accipitur*' is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness that verdict and was precluded from taking any step to challenges it at the second trial.

[227] See also the dicta of His Majesty Raja Azlan Shah J (as His Royal Highness then was) in *Syed Ismail v. PP* [1967] 1 LNS 175.

[228] After reviewing the authorities from Australia, UK, USA and India, His Lordship said as follows:

> Thus, the principle underlying issue estoppels is firmly rooted in this country, Australia, India and the United States of America. In the United Kingdom, although its application is foreign to the criminal law no exception is taken to its soundness as a principle of law. It seems to me that these cases turned upon whether there had been a specific finding on an issue of fact - an issue directly raised regarding an ingredient of the offence charged at the later trial when the accused was acquitted in the former proceeding. Simply stated, the principle of issue estoppels relates only to the admissibility of evidence which is designed to upset the finding of fact recorded by a competent court on a lawful charge after a lawful trial. … It only precludes evidence being led to prove a fact in issue as regards which evidence has already been led and a competent court on a former occasion has made a specific finding in favour of the same prisoner.

[229] Hence, there is a real and serious doubt whether with the acquittal of the principal charge, the alternative charge may be proceeded with. In the present case, the prosecution is obliged to accept that the accused did not knowingly abet TGB in the making of the impugned misstatement as the Sessions Court has acquitted both accused on the principal charge.

[230] Faced with such estoppel by the said acquittal, the accused must also *ipso facto*, be acquitted of the alternative charge, failing which, it would constitute a reopening of the verdict and issues in the principal charge of which they have been acquitted. The offence as framed by involving s. 122B(a)(bb) of the Act is precisely that the accused as director had abetted TGB in the commission of the offence of submitting a misleading statement to BMSB. However, this offence is precisely what the accused has been acquitted of.

[231] In *Khoo Cheng Huat v. PP* [1990] 2 CLJ 790; [1990] 2 CLJ (Rep) 236 Edgar Joseph Jr J (as His Lordship then was) was faced with an appeal by an accused who was acquitted of the charge of soliciting but convicted of the charge of accepting gratification of RM100 arising from events which occurred on the same date, at the same time and place.

[232] His Lordship set aside the conviction of the charge of acceptance and said as follows at p. 240:

> The question therefore of critical substance was whether, having regard to the particular circumstances of this case, the learned president was right in convicting the appellant of the charge of acceptance, having acquitted him of the charge of soliciting, the very sum he had allegedly accepted – an acquittal against which the prosecution had not appealed and the correctness of which they were bound to accept. The maxim *rejudicata pro veritate acceptur* is no less applicable to criminal than to civil cases, (see *Sambasivam v. The Public Prosecutor* [1950] 1 MLJ 145).
>
> ... It is trite law that an appellant may have his conviction quashed on the ground that the verdict against him was inconsistent with his acquittal on another count, if it can be demonstrated that the inconsistency is such that it would not be safe to allow the verdict to stand. (See *R v. Hunt* 52 CAR 580 per Lord Parker CJ).

[233] Coming back to the case at hand, as the accused has been acquitted of knowingly abetting TGB in the commission of the offence, surely estoppels of that verdict destroys the very basis of the alternative charge. Conversely, surely if he is to be subsequently found guilty of the alternative charge, that verdict will stand in contradiction of the acquittal of the principal charge.

[234] Now, surely no just and fair legal system can allow repetitive prosecutions of same facts similar charges. There must be finality and the prosecution has to accept the court's decision. It is precisely this risk of double jeopardy to the accused person that art. 7(2) of the Federal Constitution seeks to prevent.

[235] *PP v. Lee Siew Ngock* [1966] 1 LNS 143 (*Lee Siew Ngock's* case) concerns an appeal by the Public Prosecutor against the acquittal of the respondent by the Sessions Court in Summons Case No. 6 of 1964 on a charge of giving willfully and with intent to evade tax, a false answer in writing to the Income Tax Department or alternatively of giving incorrect information without reasonable excuse, all offences under the Income Tax Ordinance.

[236] The ground of acquittal was that the respondent had been tried and acquitted of the same offence in the Penang Summons Case No. 5 of 1964 and therefore the plea of *autrefois acquit* was available to him.

[237] The charges in the first prosecution (Sessions Court Summons Case No. 5 of 1964) state:

> That you on the 1 October 1955 at Penang gave a false answer in writing to a request for information made in accordance with the provisions of the Income Tax Ordinance 1947 and thereby committed an offence under s. 92(1) (c) of the Income Tax Ordinance 1947 and punishable under s. 92 of that Ordinance. PARTICULARS [...]
>
> ALTERNATIVELY That you on the 1 October 1955 at Penang without reasonable excuse gave incorrect information in relation to a matter affecting your own liability to tax and thereby committed an offence under s. 91(1)(b) of the Income Tax Ordinance 1947 and punishable under s. 91 of that Ordinance. PARTICULARS [...]

[238] The charges in the subsequent prosecution (Sessions Court Summons Case No. 6 of 1964) states:

> That you on the 14 April 1954 at Penang willfully, with intent to evade tax, gave a false answer in writing to a request for information made in accordance with the provisions of the Income Tax Ordinance, 1947 and thereby committed an offence under s. 92(1) (c) of the Income Tax Ordinance, 1947 and punishable under s. 92 of that Ordinance. PARTICULARS [...]
>
> ALTERNATIVELY That you on the 14 April 1954 at Penang without reasonable excuse gave incorrect information in relation to a matter affecting your own liability to tax and thereby committed an offence under s. 91(1)(b) of the Income Tax Ordinance, 1947 and punishable under s. 91 of that Ordinance. PARTICULARS [...]

[239] MacIntyre J (as he was then) upheld the acquittal of a second charge on the basis that the respondent had been tried and acquitted of the same offence in an earlier case. His Lordship held as follows at p. 229:

> Now the acquittal of the respondent in Summons Case No. 5 of 1964 on a charge of making a false or incorrect statement on the 1 October 1955 to the effect that he had disclosed all his assets in his statement of assets and liabilities amounts to a finding that up to that date he was unaware that any item of assets had been omitted from the statement. That issue between the parties must therefore be regarded as determined and settled for all times by the acquittal of the respondent.

> In the instant case, however, the prosecution is attempting to re-litigate that issue by trying to prove that before the 1 October 1955, to wit, on the 14 April 1954 the respondent was aware of the omission of the five bank accounts from the same list of assets and liabilities which was put in evidence in Summons Case No. 5 of 1964. Awareness is an essential ingredient of the charge for if he was not aware of the omission the question of willfully making a false certificate of disclosure will not arise. In my opinion, any attempt by the prosecution to re-open the issue would be barred by the principles of issue estoppels as well as *res judicata*.
>
> … To attempt to re-litigate an issue which has been litigated on and determined by a court of competent jurisdiction would in my opinion be an abuse of the process of the court.
>
> … Even if in the opinion of the prosecution that story is untrue, as long as the acquittal stands unreversed by an appeal court, the finding of a court of competent jurisdiction cannot be challenged in another trial. The finding of fact in Summons Case No. 5 of 1964 was to the effect that even as late as the 1 October 1955 the respondent was not aware that the five bank accounts had been omitted from his statement of assets and liabilities.
>
> The nature of the evidence required to prove the charge in the instant case must be to the effect that the respondent was aware of the omission in 1964. If that evidence is accepted then the acquittal in Summons Case No. 5 of 1964 would be proved to be wrong for if the respondent was aware of the omission in 1954 he must have been aware of it in 1955. I think that the difficulties of the prosecution stem from the fact that they had chosen to proceed with the disposal of the cases in the order of their serial numbers rather that in the chronological order or events …

[240] In *Hinampad Enterprise Sdn Bhd v. Director Offorestry & The Government of the State of Sabah* [1996] 1 LNS 11, Richard Malanjum J (as His Lordship then was) agreed with the views of Maclntyre J (as His Lordship then was) expressed in *Lee Siew Ngock's* case.

[241] Following *Lee Siew Ngock's* case, the present case of acquittal of the principal charge must mean that both accused was up to the material date (ie, 15 February 2007) unaware that the "Quarterly Report on Unaudited Consolidated Results For The Financial Year Ended 31 December 2006" was misleading in a material particular.

[242] Therefore, both accused could not in essence be tried for an offence under s. 122B of the Act which in essence is that they did with intent to deceive (ie, knowingly) cause TGB to make or furnish the said "Quarterly Report on Unaudited Consolidated Results For The Financial Year Ended 31 December 2006" which was a false or misleading statement or report to the stock exchange.

[243] Such further proceedings would be barred by the rules of double jeopardy as enshrined in art. 7(2) of the Federal Constitution.

[244] The alternative charge in the manner as laid out against the accused must therefore be held to be in violation of art. 7(2) of the Federal Constitution and, therefore, unconstitutional and invalid.

Conclusion

[245] Where there is an infringement of a constitutional right, it is the task of the courts to ensure that the wrongs are effectively remedied.

[246] In *Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah & Anor* [2011] 1 CLJ 568 Richard Malanjum CJ said as follows at p. 587[46]:

> The view of Budd J was subsequently supported by Walsh J in *Meskell v. Coras lompair Eireann* [1973] IR 121 at p. 133 when he said that 'if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right'. (See also: *Byrne v. Ireland* [1972] IR 241). And it is the task of the courts to ensure that where rights are wrongfully breached that remedies are effective'. (See: *Meadows v. Minister for Justice Equality and Law Reform* [2010] IESC: *Basheshar Nath v. Commr of Income-tax, Delhi and Rajasthan* AIR 1959 SC 149: *Ntandazeli Fose v. The Minister of Safety and Security* [1997] ZACC 6: *Maharaj v. Attorney-General of Trinidad and Tobago* (No. 2) [1979] AC 385 (PC): *Simpson v. Attorney-General (Baigent's case)* [1994] 3 NZLR 667 (CA)). I find no reason why the foregoing legal principles cannot be adopted into our local jurisprudence.

[247] The rights contained in the Federal Constitution are so cherished that the courts must act to provide a remedy even for the slightest infraction of such rights. See dicta of the CJ in the same case, in quoting *A-G v. Times Newspaper* [1974] AC 273 at p. 310, per Lord Diplock.

[248] The *dicta* of Gopal Sri Ram FCJ in *Lee Kwan Woh's* case is applicable in the instant case. His Lordship said as follows at p. 632:

> However, when the principle is applied to a criminal case, what it means is that an accused has a constitutionally guaranteed right to receive a fair trial by an impartial tribunal and to have a just decision on the facts. If there is an infraction of any of these rights, the accused is entitled to an acquittal. (para. 18).

[249] In the past, the Malaysian Courts have declared laws which are inconsistent with the Federal Constitution to be void. The following are some of the cases:

(a) *Repco Holdings Bhd v. PP* [1997] 4 CLJ 740 - where the High Court declared s 126(2) of the Securities Industry Act 1983 and s. 39(2) of the Securities Commission Act 1993 unconstitutional, null and void.

(b) *PP v. Dato Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 - where the Supreme Court declared s. 418A of the Criminal Procedure Code unconstitutional, null and void.

(c) *Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 – where the Federal Court declared art. XXX1A of the Kelantan State Constitution unconstitutional, null and void, and of no effect.

(d) *Mamat Daud & Ors v. Government of Malaysia* [1986] 2 CLJ 118; [1986] CLJ (Rep) 190 - where the Federal Court declared s. 298A of the Penal Code unconstitutional, null and void and of no effect.

(e) *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 - where the Federal Court held that the right to make a submission of no case to answer at the close of the prosecution's case is guaranteed under arts. 5(1) and 8(1) of the Federal Constitution and that if the accused person is deprived of this right, his conviction must be set aside.

[250] This court, therefore, ordered as follows:

(a) That s. 122(1) of the Act be and is hereby declared unconstitutional and void as being in violation of the right to a fair trial because s. 122(1) of the Act completely abrogates the fundamental right of an accused person to be presumed innocent until proven guilty. As a result, s. 122(1) of the Act, therefore, violates arts. 5(1) and 8(1) of the Federal Constitution;

(b) That s. 122(1) of the Act be and is hereby declared unconstitutional and void as being in violation of the right to a fair trial because s. 122(1) completely abrogates the fundamental right that a criminal charge must be proved by the prosecution against the accused beyond reasonable doubt. As a result, s. 122(1) of the Act therefore violates arts. 5(1) and 8(1) of the Federal Constitution;

(c) That the arbitrary and indiscriminate use of s. 122(1) of the Act in this case is in violation of the fundamental rights of both accused guaranteed under arts. 5(1) and 8(1) of the Federal Constitution and must be struck down as unconstitutional;

(d) That s. 122(1) of the Act violates the doctrine of separation of powers as enshrined in the Federal Constitution and is unconstitutional and void;

(e) That the continued prosecution of both accused under the alternative charge after his acquittal on the principal charge is unconstitutional because it is being done in violation of art. 7(2) of the Federal Constitution;

(f) That both accused be hereby acquitted and discharged on the alternative charge; and

(g) That the declaration of this court that s. 122(1) of the Act is unconstitutional and therefore, void, takes effect prospectively from the date of this judgment in order not to render invalid the prosecutions which have been instituted by the Public Prosecutor in other cases under s. 122(1) of the Act.

Stay Application

[251] In view of the far reaching effects of the decision of this court and the numerous and complex issues raised in this reference, this court, upon the oral application of the learned SDPP for a stay pending the outcome of the Public Prosecutor's appeal to the Court of Appeal and, upon being informed by the learned defence counsels that they have no objections to her request, granted a stay of the decision and orders of this court.